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UNITED STATES OF AMERICA

IN THE

Supreme Court of the United States

.....Term, 1949

No.....

EDITH CHURCH,

Petitioner,

vs.

THE PEOPLE OF THE STATE OF MICHIGAN,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF MICHIGAN

TO THE HONORABLE CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Your petitioner, Edith Church, respectfully shows:

SUMMARY STATEMENT OF MATTER INVOLVED

The first principal question involved herein is whether the arrest of the Petitioner deprived her of due process of law under the laws and the Constitution of the State of Michigan, and thereby violated the XIV Amendment to the Constitution of the United States relating to due process.

The second principal question involved is whether the constitutional protection given under the IV Amendment to the Constitution of the United States is, by the XIV Amendment to the Federal Constitution, imposed upon the State of Michigan.

Petitioner was convicted of indecent exposure under Section 335 of the Michigan Penal Code (28.567 M.SA.) by the Circuit Court of the County of Monroe, Michigan, after her arrest by the County Sheriff without a warrant, and after an invasion by him of private property for the purpose of making such arrest. The crime is a misdemeanor.

Application for leave to appeal the conviction to the Michigan Supreme Court was timely filed in accordance with Michigan Criminal Law Procedure, and was denied on September 8, 1949.

PRINCIPAL QUESTIONS OF LAW FOR CONSIDERATION

I

The first principal question of law to be considered in this case is whether the Supreme Court of Michigan has decided a Federal question of substance in a way not in accord with the applicable decisions of this court. It is petitioner's contention that such has been the case, and that she has been deprived of a substantive right granted to her by the Constitution of the State of Michigan, and consequently has been denied due process of law under the XIV Amendment to the Constitution of the United States.

II

It is the further contention of the Petitioner herein that in this instance the protections of the IV Amendment to the Federal Constitution are written into the due process clause of the XIV Amendment in accordance with the decisions in *Murdock* v. *Pennsylvania,* 319 U.S. 105 and *Everson* v. *New Jersey,* 330 U.S. 1, and in view of the fact that the right to be secure from unreasonable searches and seizures is just as fundamental a right as freedom of religion, and is not a procedural right such as that of trial by jury and the right against self-incrimination as provided by the V Amendment.

Article II, Section 10, of the Michigan Constitution of 1908 provides as follows:

> "The person, houses, papers and possessions of every person shall be secure from unreasonable

searches and seizures. No warrant to search any place or to seize any person or things shall issue without describing them, nor without probable cause, supported by oath or affirmation."

Article II, Section 16, of the Michigan Constitution provides:

> "No person shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty or property, without due process of law."

The Petitioner herein was charged with indecent exposure under Section 335 of the Michigan Penal Code (28.567 Michigan Statutes Annotated), which reads as follows:

> "Any man or woman * * * who shall designedly make an open or indecent or obscene exposure of his or her person, or of the person of another, shall be guilty of a misdemeanor, punishable by imprisonment in the county jail not more than one (1) year, or by fine of not more than five hundred (500) dollars. * * *"

The Michigan statute on arrests (28.874 Michigan Statutes Annotated) provides:

> "Any peace officer may, without a warrant, arrest a person—
>
> (a) For the commission of any felony or misdemeanor committed in his presence; * * *"

Petitioner was arrested by the Sheriff of Monroe County (a peace officer) for the commission of this misdemeanor. The officer did not have a warrant for her arrest at the time, and the misdemeanor charged was not committed in

his presence. The facts of the case show that the officer suspected that the misdemeanor charged herein was being committed upon the premises involved, and, without a warrant, and without color of any authority, constitutional or statutory, entered upon private property and caused the arrest of Petitioner, and others.

It is Petitioner's legal contention that such arrest was illegal, and without justification or basis under the Constitution and laws of the State of Michigan, or of the United States; that when the Supreme Court of the State of Michigan refused leave to appeal this case Petitioner was deprived of fundamental constitutional rights under the Michigan Constitution and, therefore, was deprived of fundamental rights granted to her by the due process clause of the XIV Amendment to the Federal Constitution. Petitioner further contends that, the protections granted by the IV Amendment to the Federal Constitution, being in nature fundamental, are applied to the States by the XIV Amendment in the same manner as the provisions of the I Amendment are applied to the States by the XIV Amendment.

SUMMARY OF EVIDENCE

Petitioner and several others were arrested on August 29, 1948, by a raiding party in a clearing in a wooded area near Monroe, Michigan. The clearing was adjacent to the clubhouse of an organization known as "The Bruins", of which Petitioner was a member. "The Bruins" had leased the land upon which the clubhouse was located, and the open area adjacent thereto, from one Frank O. Pohl. The area was more than 125 feet from a public highway, and woods surrounding the clearing were

dense, and were reinforced along the perimeter of the open space by a brush fence. Objects in the clearing could not be seen from the highway or from a farmhouse across the road.

The only means of access to the property was the private drive leading to the clubhouse over and across the property of Frank O. Pohl, which driveway commenced at the main highway and ended at the leased property. The property so leased to "The Bruins" was clearly posted along the main road with signs marked "Private" and "No Trespassing". Petitioner and others arrested all are members of the American Sunbathing Association, and at the time of their arrest were participating in sunbathing practices common to that organization.

The day of the arrest the raiding party was under the supervision of Ray Gensler, Sheriff of the County of Monroe, Michigan. At the time of the raid he had neither a warrant for the arrest of any person, nor a search warrant. The facts show that he had not seen any nude persons on the premises prior to the raid, and that he had made no attempt to obtain a search warrant for the property. He merely testified that he had had information that there was a nudist camp being operated in the vicinity where the raid was made, and that on previous occasions he had visited the spot where the camp was located, that he saw buildings, tables, outdoor fireplace and boxes used as seats, but that the camp appeared deserted.

The Sheriff further testified that on a second trip to the site he had picked up a shield with printed matter on it, reading "American Sunbathing Association", and that he had information that the American Sunbathing Associa-

tion was a nudist organization. He further testified that on the morning preceding the raid he had flown over the area where the raid was made, and that he had seen cars parked on the edge of the clearing and that he had seen what he believed to be persons walking around. He did not testify, however, that he had seen anyone engaging in the practice of nudity, or that he had seen anything that would indicate the violation of any law.

At the time of the raid the Sheriff and his party drove over the private property hereinbefore described, uninvited, and along such drive to the clearing next to the clubhouse. At the time the officers arrived at the clearing, having come across private property, and being without a warrant of any kind, they noticed several people, both men and women, mingling in the clearing. Some were partially dressed, while others were entirely nude. The Sheriff called out "You are under arrest, stand where you are." Testimony as to whether the Petitioner was nude when the officers arrived is in dispute. No warrant was ever issued for the arrest of Petitioner, and the arresting officer had seen no one in the nude until he entered the private lane and came upon the private property of "The Bruins".

SUMMARY OF PLEADING AND COURT ACTION

Petitioner was arrested and trial was had before a jury in the Circuit Court for the County of Monroe, Michigan, upon the charge of indecent exposure. Petitioner was found guilty, along with others. In the Circuit Court, both upon trial and upon motion for new trial, the question of legality of the arrest herein under the Michigan Con-

stitution and under the Constitution of the United States was raised, and that court refused to consider this claim. Upon her conviction Petitioner was sentenced to pay a fine of $75.00, and costs in the amount of $75.00, and was placed on probation for a period of six months.

Petition for leave to appeal to the Supreme Court of Michigan was filed in accordance with Michigan Criminal Law Procedure, and on September 8, 1949, this application for leave to appeal was denied by the Michigan Supreme Court. Consequently, all remedies within the State of Michigan have been exhausted.

JURISDICTIONAL STATEMENT

Jurisdiction of this Court is based on Title 28, Sec. 344 (b), United States Code.

QUESTIONS PRESENTED

I.

Was the Petitioner deprived of due process of law under the law of Michigan, and Article II, Sections 10 and 16, of the Michigan Constitution of 1908, by the manner in which she was arrested, and was such arrest thereby a violation of the XIV Amendment to the Constitution of the United States of America?

II.

Is the Petitioner protected from the illegal arrest effected herein by the IV Amendment to the Constitution

of the United States relating to unreasonable searches and seizures, that is, are the provisions of the IV Amendment to the Constitution, which involves substantive rights, imposed upon the States by the XIV Amendment to the Constitution?

REASONS RELIED UPON FOR ALLOWANCE OF WRIT

A.

Petitioner was denied due process of law contrary to the Constitution of the State of Michigan, Article II, Section 16, and was subjected to an unreasonable search and seizure contrary to Article II, Section 10, of the Michigan Constitution. The Supreme Court of Michigan refused to take action upon the unconstitutional acts of lower officials, and, consequently, the XIV Amendment to the Federal Constitution must be applied by the Supreme Court of the United States to guarantee to Petitioner rights given to her under the Michigan Constitution.

In refusing to grant leave to appeal in the instant case, the Supreme Court of the State of Michigan refused to review the action of the Circuit Court for the County of Monroe, Michigan, and has thereby denied Petitioner constitutional rights granted her by both the State and Federal Constitutions.

Article II, Section 10, of the Michigan Constitution of 1908, now in effect in Michigan, provides:

> "The person, houses, papers and possessions of every person shall be secure from unreasonable searches and seizures. No warrant to search any place or to seize any person or thing shall issue

without describing them, nor without probable cause, supported by oath or affirmation."

Article II, Section 16, of the Michigan Constitution is also applicable. It provides:

> "No person shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty or property, without due process of law."

The Michigan statute applicable to arrests provides:

> "Any peace officer may, without a warrant, arrest a person—
>
> (a) For the commission of any felony or misdemeanor committed in his presence; * * *" (28.874 M.S.A)

The arrest in this case, therefore, is clearly illegal, both under the terms of the Michigan Constitution and the terms of the Michigan statute covering arrests.

No warrant was ever secured for the arrest of Petitioner, and no misdemeanor was committed in the presence of officers prior to the time they made an illegal search and entry upon the premises involved. A felony was not involved, and consequently that provision of the law which permits an arrest without a warrant upon suspicion of felony is not applicable.

There is no allegation, nor contention, in this case that the officer did not have ample time or opportunity to obtain a warrant.

Because of the illegality of this arrest under Article II, Section 10, of the Michigan Constitution, and under the

statutes of the State of Michigan, as quoted herein, and further, because of the failure of the Circuit Court for the County of Monroe, Michigan, to protect Petitioner in her constitutional rights, and the further failure of the Supreme Court of Miichigan to grant leave to appeal this case, Petitioner has been denied by the judicial system of Michigan the due process guaranteed to her by the XIV Amendment to the Federal Constitution. Further, the arrest of Petitioner was violative of her inherent right to due process of law under the traditional concept of ordered liberty.

Moreover, the action of the Michigan Courts, and particularly the Supreme Court of Michigan, in denying leave to appeal, was in violation of Article II, Section 16, of the Michigan Constitution which guarantees to a citizen of this State due process of law under the law of the State. This denial of due process under the laws of the State of Michigan constitutes a violation of the XIV Amendment to the Constitution of the United States.

Clearly, the XIV Amendment to the Constitution of the United States may be invoked against any state to protect persons within that state from violation of constitutional rights granted to them by the state, and to protect them in their basic right to due process of law. *Screws* v. *United States,* 323 U.S. 91; *Glicker* v. *Michigan Liquor Control Commission,* (CCA 6) 160 F 2d 96; *McShane* v. *Moldovan,* (CCA 6) 172 F 2d 1016.

In failing to grant leave to appeal in this case, the Supreme Court of Michigan did not protect the constitutional right of this Petitioner to due process of law and to be free from unreasonable searches and seizures. By such action the Supreme Court of Michigan has decided a fed-

eral question of substance in a way definitely not in accord with the decisions of the Supreme Court of the United States.

Under the terms of the *Screws* case, supra, the *Glicker* case, and the *McShane* case, supra, the Supreme Court of the United States clearly has the power under the XIV Amendment to protect persons against state action which is contrary to the laws of the state, or contrary to the constitution of the state, and, consequently, violative of the XIV Amendment to the Federal Constitution. Further, due process contains within itself certain minimal standards which are "of the very essence of a scheme of ordered liberty," *Palko* v. *Connecticut*, 302 U.S. 319; concurring opinion of Justice Frankfurter in *Adamson* v. *California*, 332 U.S. 46.

> "The relevant question is whether the criminal proceedings which resulted in conviction deprived the accused of the due process of law to which the United States Constitution entitled him. Judicial review of that guaranty of the Fourteenth Amendment inescapably imposed upon this Court an exercise of judgment upon the whole course of the proceedings in order to ascertain whether they offend those canons of decency and fairness which express the notions of justice of English-speaking peoples even toward those charged with the most heinous offenses. * * *"
>
> Justice Frankfurter, concurring, Adamson v. California, 332 U.S. 46, pp 67-68

Clearly in this case, not only has the whole course of the proceedings offended canons of fairness and decency, but there have been specific violations of the Michigan Con-

stitution and the Michigan statutes, countenanced by the failure of the Supreme Court of Michigan to grant leave to appeal.

Therefore, the Supreme Court of the United States is the only judicial body remaining which can now act in this matter and grant to Petitioner the basic protections of the Michigan Constitution and the Michigan Statutes available to her, and denied to her by the Supreme Court of Michigan. And, as a vehicle for the protection of these rights, the Supreme Court of the United States can evoke the protection of the XIV Amendment, as it has many times before.

B.

The guarantees of the IV Amendment to the Constitution of the United States of America are imposed upon the states by the XIV Amendment in the same way that the protection of the I Amendment to the Constitution is imposed upon the states, since the rights protected by the IV Amendment are as basic and substantive as the rights protected by the I Amendment.

The IV Amendment to the Constitution of the United States provides:

> "The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

It is the contention of the Petitioner herein that these basic fundamental rights should be protected within all

the states by the provisions of the XIV Amendment, in the same manner that the basic fundamental right of freedom of religion under the I Amendment has been imposed upon the states by the XIV Amendment. *Everson* v. *New Jersey,* 330 U.S. 1; *People of State of Illinois* v. *Board of Education,* 333 U.S. 203. Both of these cited cases apply the principle of *Murdock* v. *Pennsylvania,* 319 U.S. 105.

It is further contended by Petitioner that the protections of the IV Amendment can be read into the XIV Amendment without doing violence to, or in any way overturning the rule of *Adamson* v. *California,* 332 U.S. 46. This is so because the rights involved in the *Adamson* case are procedural in nature, and are not basic substantive rights, such as those granted by the I Amendment, and those granted by the IV Amendment relating to freedom of the person and place of an individual from unreasonable search and seizure.

As pointed out in the majority opinion, the concurring opinion, and the dissenting opinion in the *Adamson* case, the exact meaning of the XIV Amendment has been a source of constant debate in the Supreme Court of the United States. In *Twining* v. *New Jersey,* 211 U. S. 78, the Supreme Court held that the privilege against self-incrimination was not immune from abrogation by the state, saying, "The first eight amendments are restrictive only of national action, and while the Fourteenth Amendment restrained and limited state action, it did not take up and protect citizens of the states from action by the states as to all matters enumerated in the first eight amendments."

Although the *Twining* case was supposed to have settled the question and left the rights of the individual against the state to be determined, not by the language of the Bill of Rights, but by the Court upon consideration of what it thought to be fundamental and natural rights, the case did not do so. Gradually in the Supreme Court there grew up a distinction between natural rights on the one hand, and methods of procedure on the other, as they appeared in the Bill of Rights. A fairly recent emptomization of this growing difference is stated by Mr. Justice Cardozo in *Palko* v. *Connecticut*, 302 U. S. 319, where he said:

> "The right to trial by jury and the immunity from prosecution except as the result of an indictment may have value and importance. Even so, they are not of the very essence of the scheme of ordered liberty * * * Few would be so narrow or provincial as to maintain that a fair and enlightened system of justice would be impossible without them. * * * So it has come about that the domain of liberty, withdrawn by the Fourteenth Amendment from encroachment by the states, has been enlarged by latter day judgments to include liberty of the mind as well as liberty of action * * * Liberty is something more than exemption from physical restraint, and even in the field of substantive rights and duties the legislative judgment, if oppressive and arbitrary, may be over-ridden by the courts."

In *Murdock* v. *Pennsylvania*, supra, *Everson* v. *New Jersey*, supra, and *People of the State of Illinois* v. *Board of Education*, supra, this court agreed that the provisions of the I Amendment were so fundamental to human freedom that they should be attributed to the states through the XIV Amendment.

In the *Adamson* case, supra, decided after the *Murdock* and *Everson* cases, but before the *Illinois* case, this Court held that the provisions of the V Amendment relating to the right of an accused in the Federal Courts not to have the prosecution comment upon his failure to take the stand, were not imposed upon the states by the XIV Amendment. This Honorable Court consequently held that a California statute, which allowed the prosecutor to comment upon the failure of the accused to take the stand, was a procedural device, and not basic and fundamental to a system of ordered liberty. This holding is entirely consistent with the holding of this court in the *Murdock*, *Everson* and *Illinois* cases, because the right of freedom of religion is one basic to an ordered system of liberty, as is the right to be secure in one's person from unreasonable searches and seizures, and the right not to have the prosecutor comment upon the failure of the accused to take the stand in a criminal case is more procedural, and not basic to fundamental human rights.

In the light of these four cases this Court has drawn a distinction between procedural and substantive rights granted under the Bill of Rights. Clearly the right to be free from unreasonable search and seizure is just as fundamental a human right, and just as necessary to any ordered legal system, as the right of freedom of religion. It is not a nicety of procedure, but rather something that goes to the basis of human liberty and ordered justice. As stated by this Court in *United States* v. *DiRe*, 332 U. S. 581:

> "* * * It is said that if such arrests and searches cannot be made, law enforcement will be more difficult and uncertain. But the forefathers, after con-

> sulting the lessons of history, designed our Constitution to place obstacles in the way of a too permeating police surveillance, which they seemed to think was a greater danger to a free people than the escape of some criminals from punishment. • • •"

Clearly, in this instance, the protections given by the IV Amendment are so substantive that they should be read into the XIV Amendment, and applied to the states.

Therefore, it is Petitioner's contention that a Writ of Certiorari should be granted in the within case for two reasons:

1. The Supreme Court of Michigan has violated the Federal Constitution, and has taken action contrary to action by this Court in similar cases in refusing to grant leave to appeal, and in denying Petitioner basic rights granted her under the Constitution of the State of Michigan and the XIV Amendment to the Constitution of the United States.

2. The privilege to be secure in one's person from unlawful search and seizure is so basic to any system of ordered liberty that it should be read into the XIV Amendment as the freedom of religion provisions of the I Amendment were read into that Amendment in the cases cited herein.

RECORD

Transcript of the record on application for leave to appeal to the Michigan Supreme Court, and Order Denying Leave to Appeal are attached hereto and submitted herewith in accordance with Rule 38 of this Court.

PRAYER

Petitioner prays that a proper Writ of Certiorari be issued, directed to the Supreme Court of the State of Michigan, that this cause may be reviewed and reversed, and that such other relief be granted as may be proper.

Respectfully submitted,

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UNITED STATES OF AMERICA

IN THE

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.....Term, 1949

No.....

EDITH CHURCH,

Petitioner,

vs.

THE PEOPLE OF THE STATE OF MICHIGAN,

Respondent.

BRIEF IN SUPPORT OF WRIT OF CERTIORARI

FACTUAL STATEMENT

The facts in this case are set forth in detail in the Petition for Writ of Certiorari and consequently will not be repeated here.

ARGUMENT

A. Decision of Supreme Court of Michigan herein not in accord with applicable decisions of this Honorable Court.

It is respectfully submitted to this Honorable Court that the decision of the Supreme Court of Michigan in refusing to grant leave to appeal in the within matter is not in accord with applicable decisions in this type of case in this Honorable Court, in that by its refusal to grant leave to appeal the Supreme Court of Michigan foreclosed Petitioner from the protection of constitutional rights guaranteed her under the Constitution of Michigan and under the XIV Amendment to the Constitution of the United States of America.

B. Refusal of State court to grant Petitioner constitutional rights under the state law and the applicable Federal law.

In refusing to grant leave to appeal in the within matter, thereby foreclosing Petitioner of all further rights in Michigan courts, the Supreme Court of Michigan denied Petitioner constitutional rights granted her by both the State Constitution and the 14th Amendment to the Federal Consitution.

Article II, Section 10 of the Michigan Constitution provides:

> "The person, houses, papers and possessions, of every person shall be secure from unreasonable searches and seizures. No warrant to search any place or to seize any person or thing shall issue without describing them, nor without probable cause, supported by oath or affirmation."

Article II, Section 16 of the Michigan Constitution provides:

> "No person shall be compelled in any criminal case to be a witness against himself nor be deprived of life, liberty or property, without due process of law."

The Michigan Statute relating to arrest provides:

> "Any peace officer may, without a warrant, arrest a person - - (a) for the commission of any felony or misdemeanor committed in his presence; . . . ." Section 17149 C.L. 1929; 28.874 M.SA.

The rule that one cannot arrest in Michigan for a misdemeanor without a warrant, unless the misdemeanor is committed in the presence of the arresting officer, has been many times sustained by the Courts of Michigan. *Allar* v. *Board of Auditors,* 43 Mich. 76; *Ross* v. *Leggett,* 61 Mich. 445.

In the instant case, the arrest of Petitioner by the police officer without a warrant is clearly illegal and contrary to both the Statutes of Michigan and the Constitutional provisions of the State. It deprived her of due process and subjected her to illegal search and seizure.

At the time of her arrest, under Section 335 of the Michigan Penal Code (28.567 M.S.A.), Petitioner along with others was engaging in a practice of sunbathing in accordance with the custom of the American Sunbathing Association of which they were members.

The offense charged was a misdemeanor. The alleged offense occurred on a piece of private property rented by

the Petitioner and others for their own use and clearly obscured by brush and heavy forest from the view of any persons other than those participating in the sunbathing. The facts of the case show that the sheriff who made the arrest did not see the commission of any misdemeanor, or anything that would lead him to believe that there had been a violation of the law, prior to the time he entered upon private property on suspicion and came upon the Petitioner and others in the private clearing described herein.

The sheriff did not have a warrant for the arrest of Petitioner and others, and had made no effort to obtain one. He only came to the premises because he suspected that a misdemeanor was being committed, upon the basis of certain information he had obtained from previous visits to the premises.

Clearly, then, the arrest in this case was illegal under the Michigan Statute quoted above, and, consequently constituted an illegal search and seizure contrary to the provisions of Article II, Section 10 of the Michigan Constitution

This action, along with the refusal of the trial Court to dismiss the case because of the illegal arrest, further resulted in the denial of due process to Petitioner under Article II, Section 16 of the Michigan Constitution.

In refusing to grant leave to appeal, the Supreme Court of Michigan refused to invoke Michigan constitutional principles which it had the duty to invoke in such instances.

All these questions were raised both in the trial of the cause in the Monroe County Circuit Court and in the petition for leave to appeal to the Supreme Court of Michigan.

In light of the failure of the Supreme Court of Michigan to protect the constitutional guarantees granted to this Petitioner by the Constitution of Michigan and the Statutory privileges granted to her under the Statutes of the State quoted herein, the Petitioner can look only to this Honorable Court for the protection due her under the Laws and Constitution of the State of Michigan, and this Honorable Court has the authority to act to protect those rights under the terms of the XIV Amendment to the Constitution of the United States of America.

There is no question that, when the state judiciary has failed to accord to persons within the state, constitutional rights to which they are entitled under the state constitution, and has failed to enforce the law of the state to protect the rights of individuals within the state, the XIV Amendment to the United States Constitution provides relief for the aggrieved person. *Screws* v. *United States,* 325 U.S. 91; and *Glicker* v. *Michigan Liquor Control Commission,* 160 F. 2d 96 (C.C.A. 6).

In the *Screws* case, this Honorable Court said:

> "Generally, state officials know something of the individual's basic legal rights. If they do not, they should, for they assume that duty when they assume their offices . . . It is less an excuse for men whose special duty is to apply it, and therefore to know and abuse it. If their knowledge is not comprehensive, state officials know, or should know, when they pass the limits of their authority, so far at any rate

> that their action exceeds honest error of judgment and amounts to abuse of their office and its function. When they enter such a domain in dealing with the citizens rights, they should do so at their peril, whether they be created by state or by federal law . . ."

Moreover, this Honorable Court has authority to use the XIV Amendment to inquire into state courts' action to insure that due process is granted and certain minimal standards which are the essence of the scheme of ordered liberty are maintained. *Palko* v. *Connecticut*, 302 U.S. 319. Here the Petitioner was clearly entitled to be released when it was shown that the arrest was made contrary to Michigan Law and contrary to the Michigan Constitution. Such a right is part of these certain minimal standards necessary to the scheme of ordered liberty. No state judicial system is free to disregard the mandates of its statutes and its constitution, and cavalierly dispense justice to the oppression of minority groups without being held accountable for this action, violative of the 14th Amendment, by this Honorable Court.

The Supreme Court of Michigan has ignored basic constitutional substantive rights due to Petitioner herein, and it is Petitioner's contention that the XIV Amendment not only can be, but should be utilized herein by this Honorable Court.

C. The protections of the IV Amendment to the Constitution of the United States can be and should be applied to the States through the XIV Amendment to the Constitution of the United States.

The provisions of the XIV Amendment applicable hereto provide:

> "No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

The first decisions of this Honorable Court interpreting this provision of the Constitution were *The Slaughter-house cases,* 16 Wall 36, in which it was held that these rights stated in the XIV Amendment, as privileges and immunities of state citizenship, remained under the sole protection of the state government.

However, this finding was amplified by subsequent decisions of the Court and consideration was given to almost every one of the rights granted in the Bill of Rights.

Twining v. *New Jersey,* 211 U.S. 78, held that the privilege against self incrimination was not immune from abrogation by the states, agreeing with *The Slaughter-house cases* that the first eight Amendments were restrictive only of national action and that the XIV Amendment did not protect citizens of the states from action by the states as to the matters innumerated in the Bill of Rights.

However, prior to the time of *Twining* v. *New Jersey,* a distinction between natural rights and methods of procedure as appeared in the Constitutional Bill of Rights had been made by the Supreme Court in *Downs* v. *Bidwell,* 182 U.S. 280. (*) In this case, it was held:

(*) See *The Bill of Rights Decision in Adamson* v. *California* by Frederick Coudert in Vol. 34, No. 1, American Bar Association Journal, January, 1948.

> "There are certain principles of natural justice inherent in the Anglo-Saxon character which need no expression in constitutions or statutes to give them effect or to secure dependencies against legislation manifestly hostile to their real interest. We suggest, without intending to decide, that there may be a distinction between certain natural rights enforced in the constitution by prohibition against interference with them, and what may be termed artificial or remedial rights, which are peculiar to our own system of jurisprudence."

A climax to this distinction between procedural and substantive natural rights contained in the Bill of Rights, came in the case of *Palko* v. *Connecticut,* 302 U.S. 319, where Mr. Justice Cardozo said,

> "The right to trial by jury and the immunity from prosecution except as the result of an indictment may have value and importance. Even so, they are not of the very essence of a scheme of ordered liberty . . . So it has come about that the domain of liberty withdrawn by the 14th Amendment from encroachment by the states has been enlarged by latter day judgment to include liberty of the mind as well as liberty of action . . . Liberty is something more than exemption from physical restraint, and even in the field of substantive rights and duties the legislative judgment, if oppressive and arbitrary, may be over-ridden by the courts."

In concluding, Justice Cardozo held that the question is whether the law or regulation is in violation of "those fundamental principles of liberty and justice which lie at the basis of all our civil and political institutions".

In *Murdock* v. *Pennsylvania,* 319 U.S. 105; *Everson* v. *New Jersey,* 330 U.S. 1; and *State of Illinois* v. *Board of*

Education, 333 U.S. 203, this Honorable Court decided that separation of state and church and freedom of religion granted under the I Amendment of the Federal Constitution, was such a substantive right that it was imposed on the states by the provisions of the XIV Amendment.

In *Adamson* v. *California,* 332 U.S. 46, on the other hand, the majority of this Honorable Court held that the guarantees of the V Amendment were more of a procedural nature and thus not attributable to the states by the XIV Amendment. It is interesting to note that the *Adamson* case was decided after the *Murdock* case and the *Everson* case, but before the *Illinois* case. There was a vigorous dissent in the *Adamson* case holding that the guarantees of the V Amendment should be applied to the states.

Thus, this Honorable Court has recognized that in cases, where substantive basic human rights are involved, the protections granted in the Bill of Rights for such substantive basic human rights are imposed on the states through the XIV Amendment. On the other hand, where mere procedural rights are involved, those rights are not imposed on the states by this Amendment.

It is Petitioner's contention herein that the right to be free in one's person, possessions and property, and to be free from unreasonable searches and seizures, is a basic concept of ordered liberty and such a substantive human right that it should be written to the states through the vehicle of the XIV Amendment in the same way as the protection of freedom of religion contained in the I

Amendment was ordained to the states through the XIV Amendment. Certainly, freedom from search and seizure is just as basic as freedom of religion to a well ordered liberty.

In *Johnson* v. *United States,* 333 U.S. 10, this Honorable Court said:

> "An officer gaining access to private living quarters under color of the office and of the law which he personifies must then have some valid basis in law for his intrusion. Any other rule would undermine the right of the people to be secure in their persons, houses, papers and effects, and would obliterate one of the most fundamental distinctions between our form of government, where officers are under the law and the police state where they are the law."

CONCLUSION

Petitioner having shown herein that her arrest was contrary to the laws and Constitution of the State of Michigan, and having further shown that the XIV Amendment is applicable to protect her in this instance, and the Supreme Court of Michigan having refused to protect Petitioner in her constitutional rights, it is respectfully submitted that this Honorable Court should grant a Writ of Certiorari herein and review the action of the State Court in the instant case.

RELIEF PRAYED

Petitioner respectfully submits that her petition for Writ of Certiorari to the Supreme Court for the State of Michigan be granted.

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IN THE

Supreme Court of the United States

OCTOBER TERM 1949

NO. 499

EDITH CHURCH, PETITIONER

v.

THE PEOPLE OF THE STATE OF MICHIGAN

On Petition for writ of Certiorari to the Supreme Court of the State of Michigan.

Brief opposing Petition for Certiorari

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I

Opinions Below.

The only opinion published in the transcript of record (126-128) is that of the circuit judge denying petitioner's motion (SR 11-12) for new trial.[*] Since under the law of

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[*] Numbers in parentheses refer to pages of the transcript of record of the trial court, while those preceded by the symbol "SR" refer to pages of the transcript of record and proceedings in the supreme court of Michigan.

Michigan,[1] and the rules of her supreme court,[2] an appeal in criminal cases is allowed only in the discretion of the supreme court on proper application therefor, no opinion is rendered or published and no reason is assigned for denial thereof.[3]

---

[1]

Mich. Code of Criminal Procedure, Chap. x, § 3, Mich. Comp. Laws, 1948, § 770.3, Mich. Stat. Ann. [Henderson] § 28.1100.

[2]

Mich. Court Rules 55-60.

[3]

Denial by the highest court of Michigan, of an application for leave to appeal from the judgment in a criminal case, does not litigate the merits, nor does it set a precedent. Cf. the effect of denial of certiorari by this Court, as explained by Mr. Justice Frankfurter, State v. Baltimore Radio Show, 70 S. Ct. 252, 94 U.S. [L.ed.] 240.

II

Counter-Statement on Jurisdiction.

The petitioner, we assume, invokes this Court's jurisdiction under § 1257 (3), Title 28, U.S.C., as revised.

It is briefly our position:

(1) that the questions stated in the petition for certiorari were not timely or properly presented to the courts below in compliance with recognized Michigan procedure;[4]

(2) that the supreme court of the State, in denying leave to appeal, without expressing an opinion, did not necessarily decide any federal question, substantial or otherwise, such denial probably resting (SR 15) on adequate and independent non-federal grounds; and

(3) that no federal question now presented by petitioner, possesses substance.

---

[4]

The procedure mapped by Michigan for asserting violation of constitutional guarantees against unreasonable searches and seizures, is a pretrial motion to suppress the evidence seized. People v. Marxhausen, 204 Mich. 559, cited in Table F, Appendix, opinion in Wolf v. Colorado, 338 U.S. 25, 36. See, also, People v. Vulje, 223 Mich. 656; People v. Londe, 230 Mich. 484; People v. Feltner, 234 Mich. 209; People v. Bass, 235 Mich. 588; People v. Hayek, 243 Mich. 246; and People v. Heibel, 305 Mich. 710.

III

Counter-Statement of the Case.

We respectfully note the following inaccuracies and insufficiencies in petitioner's statement (Supreme Court Rule 27):

Petitioner asserts, petition, p. 7, that "in the circuit court, both upon trial and upon motion for new trial, the question of legality of arrest herein under the Michigan Constitution and under the Constitution of the United States was raised, and that Court refused to consider this claim".[5]

But counsel have not set forth with precision the course of proceedings in either court, nor have they disclosed the inept manner in which petitioner attempted to attack the legality of her arrest:

1. The record does not include a copy of any pretrial motion to suppress evidence alleged to have been seized during an unreasonable search of the petitioner or her person, "houses, papers and effects", 4th Amendment, Federal Constitution, Michigan State Constitution, Article 2, § 10; the denial of such a motion was not asserted (SR 11) as a ground for new trial, nor in petitioner's application for leave to appeal (SR-6-7) as a reason and ground therefor. During argument of the defendants' motion to dismiss

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[5]

It is our position, of course, that if, as counsel state, such questions were first raised in the course of trial or in a motion for new trial, they came too late under prescribed procedure. See cases cited in footnote 4, and In re Reno, 321 Mich. 497; cert. denied, 335 U.S. 885; rehearing denied, 335 U.S. 905; and People v. Paugh, 324 Mich. 108.

(115-120), counsel stated (119) he had filed a motion for the suppression of evidence, but he thought "that has never been passed upon".[6]

2. The record does not include the complaint, warrant, or information, nor does it embrace any motion to quash the information on the ground that the arrest or any preliminary proceedings which followed, was illegal, a requirement under Michigan law, for otherwise such defects would be waived.[7]

3. The witness first sworn to testify for the State, was one Ray Gensler (3-18), the sheriff of Monroe County (3), yet no objection was interposed to any of his direct, res gestae testimony (3-7), nor was there any motion to strike such testimony on the ground that the arrest was illegal, or that the search and seizure (if any) was in violation of constitutional rights. It is our impression that no constitutional rights were asserted until at the close of the case, when the defense had rested, counsel moved to dismiss (115-120).

---

[6]

This, under Michigan decisions, would constitute a waiver of such a motion, People v. Kowalek, 296 Mich. 714, 717.

[7]

Cases cited in footnote 5.

Under the rules promulgated by the supreme court of Michigan, *esp.*, Rule 60, to obtain leave to appeal to the higher court from a court of record, the appellant must within the time limited for taking an appeal as of right (Rule 57) take certain definite, prescribed steps toward the settlement of a concise statement of proceedings and facts to be certified by the circuit or trial judge and pursuant to timetable, submit such statement, the application itself, and a supporting brief to the supreme court.

Obviously, then, the denial of such an application may be based upon any number of different grounds, technical or otherwise, and does not necessarily imply that the high court has passed upon the merits of the controversy, that it has decided a constitutional question. For the Michigan supreme court, like this Court, is loath to decide constitutional questions unless necessary.

So in the case at bar, it is crystal-clear to us at least, that in denying the application for leave to appeal, the supreme court of Michigan did so on non-federal grounds of adjective law.

In the concise statement of proceedings and facts (SR 3-7) there is no mention of the filing of a motion to suppress, or a motion to quash, and it is quite evident from the statement itself that the questions presented were raised on motion to dismiss at the termination of the people's case, or upon motion for new trial.

Under the Michigan rule, so often sustained and reaffirmed by her highest court, questions involving evidence seized during an unreasonable search, must be raised upon motion to suppress such evidence; questions involving the legality of an arrest must be raised on motion to quash.

We, therefore, respectfully submit that the Michigan supreme court did not necessarily decide the federal questions now presented, and that appeal was denied on non-federal grounds.

Point Three

No federal question now presented in the petition for certiorari, possesses substance.

This point, we respectfully suggest, may be treated somewhat summarily:

1. The offense of which the petitioner was convicted is defined by Michigan law, Penal Code, § 335, Stat. Ann. [Henderson] § 28.567, as follows:

> "Sec. 335. Any person who shall designedly make any open or indecent or obscene exposure of his or her person . . . shall be guilty of a misdemeanor, punishable by imprisonment in the county jail not more than one [1] year, or by a fine of not more than five hundred [500] dollars".

While it is a misdemeanor, the offense is not cognizable by a justice of the peace,[8] but is prosecuted in the circuit courts upon information.[9]

---

[8]

In Michigan, Code of Criminal Procedure, Chap. 14, § 1, Stat. Ann. [Henderson] § 28.1192, justices of the peace have jurisdiction only over criminal offenses punishable by imprisonment not exceeding 3 months or a fine not exceeding one hundred [100] dollars.

[9]

Mich. Stat. Ann. § 28.941.

As construed by our high court, in *People v. Kratz,* 230 Mich. 334, 339, where error was urged against the charge of the court in not making plain that the (indecent) exposure must be public, and where it was contended that "under the charge as given a person might be convicted if the exposure was in a private place".

> " 'Public' and 'private' as applied to places are not absolute in meaning but relative as used in contradistinction of each other. The statute makes no reference to place, either public or private. The gist of the offense is an intentional or designedly made 'open, indecent or obscene exposure of the person', necessarily in the presence of others".

And the court sustained the following charge to jury:

> " 'The term "openly" as used in this information and in the law under which the prosecution is had, means public in the sense that it was not concealed, that it was not private, that it was made in such a place and such a manner as to be a public exposure, that it was not within a concealed place or enclosure, but that it was made publicly *to the people who were there in view,* and by that . . . is not meant necessarily that it was a public ground or in a public place in the sense of its being upon public property. *It may have been upon private property, but it must have been openly and publicly with relation to the people that were there situate' ".* [Emphasis supplied].

2. The supreme court of Michigan has also held in an indecent-exposure-case involving a "nudist camp or colony",

> *People v. Ring,* 267 Mich. 657, 93 ALR 993, Anno. 996,

that one who, as the operator of a nudist camp, goes without clothing in the presence of persons living at the camp, whose sense of decency, propriety and morality is not thereby offended, may nevertheless be found guilty of violating a statute imposing a penalty on any one who shall designedly make "any open or indecent or obscene exposure of his or her person or the person of another".

There is, we respectfully submit in the light of the foregoing judicial construction of a local statute defining a criminal offense, no constitutional right to flout a law which has as its purpose the codification of standards of decency in a community; and those who desire modification of such a code should address their pleas to the legislature of the State, and not to the courts.

3. Moreover, we fail to comprehend the petitioner's claim that the constitutional provisions controlling search and seizure may be applied to the facts in this case.

There was, in the first place, no search or seizure of papers or effects, and no articles of property were later used in evidence.

The transaction occurred in an open field, not within the curtilage, and certainly not in a "castle". And the Constitution does not guarantee the privacy of open lands,

Hester v. United States, 265 U.S. 57, per Mr. Justice Holmes;

f. *People v. Ring, supra*, 267 Mich. 657.

It is therefore our position that the petition for certiorari presents no federal questions of substance.

V

Conclusion.

We, therefore, respectfully submit, on the several grounds asserted in this brief, that the petition for certiorari to the Supreme Court of the State of Michigan should be denied.

Respectfully submitted,

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